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No. 89-264

In the Supreme Court of the United States

OCTOBER TERM, 1989

RICKY DURHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner should have been allowed to cross-examine a government witness about state drug charges against that witness that had been dismissed prior to petitioner's federal trial.

2. Whether the district court properly admitted hearsay evidence from a defense witness on the government's cross-examination in response to evidence elicited by petitioner from the same witness on his counsel's direct examination.

3. Whether a letter admitted into evidence was properly authenticated, and whether a copy of the letter was properly admitted in lieu of the missing original.

4. Whether the district court should have granted a mistrial when the prosecutor in his opening statement referred to evidence that the district court subsequently excluded.

5. Whether the district court, after admitting certain rebuttal evidence, erred in not giving the jury a cautionary instruction when petitioner failed to request one.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. Al-A6, is reported at 868 F.2d 1010.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1989. On April 26, 1989, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including May 31, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury in the United States District Court for the Eastern District of Missouri convicted petitioner of murdering a United States mail carrier in the performance of his duties, in violation of 18 U.S.C. 1111, and using a firearm in the commission of a felony, in violation of 18 U.S.C. 924(c). The district court sentenced petitioner to consecutive terms of five years' imprisonment for the firearms violation and life imprisonment for the murder. The court of appeals affirmed.

1. Petitioner shot and killed United States mail carrier Kenneth Clark because Clark had failed to pay a cocaine debt to petitioner. At the time he was shot, Clark was delivering the mail on his route in St. Louis, Missouri. Pet. App. A2.

At trial the government introduced the testimony of a school teacher who saw petitioner shoot Clark; a woman who saw petitioner flee the murder scene and speed off in a green station wagon; another woman who saw petitioner obtain a gun shortly before the shooting; two witnesses who saw petitioner in the green station wagon on the day of the murder; a friend of Clark's who knew that Clark owed petitioner money for past cocaine purchases; and two witnesses to whom petitioner admitted killing Clark. The government offered additional evidence to establish that petitioner fled from St. Louis to Nevada after the shooting and gave a false name when he was arrested. The government also introduced a copy of a letter from "Ricky" threatening Clark if he did not pay a debt. Pet. App. A2-A3; Gov't C.A. Br. 1C-1J.

2. The court of appeals affirmed petitioner's convictions. First, it rejected petitioner's argument that the government improperly elicited hearsay evidence from defense witness George Walker. On direct examination,

petitioner's counsel had elicited testimony from Walker that prior to Clark's murder Walker had been approached by an unidentified person who said he was looking for Clark. The court held that by offering that evidence petitioner had "open[ed] the door" to the government's cross-examination inquiring as to that person's identity. Pet. App. A3-A4. Second, the court ruled that a threatening letter to Clark was properly admitted into evidence. From testimony that Clark owed petitioner money for prior cocaine purchases and from the fact that the letter was signed by "Ricky," the court determined that the jury could reasonably conclude that the letter was written by petitioner. In addition, the court held that a copy of the letter was admissible in lieu of the missing original because Clark's mother and sister both testified that the copy accurately reflected the contents of the original letter they had seen. *Id.* at A4-A5. Third, the court ruled that the district court properly prevented petitioner from cross-examining government witness Zach Walls concerning drug charges against him that state authorities had dismissed before petitioner's federal trial began. The court found that there was no evidence to support petitioner's speculation that the state charges may have been dismissed in exchange for Walls' federal testimony. Accordingly, the court held that the district court's "restriction on cross-examination did not violate [petitioner's] rights of confrontation." *Id.* at A5.

ARGUMENT

1. Petitioner contends that the district court violated his rights under the Confrontation Clause when it prevented him from cross-examining prosecution witness Zach Walls about state drug charges that were dismissed prior to the trial in this case. Pet. 5-10.

The Sixth Amendment Confrontation Clause entitles a defendant to cross-examine a prosecution witness about the witness's motivation for testifying and his possible bias against the defendant. *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974). The confrontation right includes the opportunity to show that a prosecution witness testified for the government in exchange for the dismissal of criminal charges. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986).

In this case, the district court allowed petitioner to cross-examine Walls on several matters going to Walls' motivation for testifying and his possible bias against petitioner. First, petitioner's counsel probed whether Walls was testifying because of police threats against him. In response to counsel's questions, Walls admitted that the police threatened to break down the door to his mother's house and to "kick [his] butt" if he declined to respond to questions about Clark's murder. Tr. 3-78 to 3-79. Petitioner's counsel also suggested through his questions that Walls had told the police three different stories about the crime and that the police were putting words into his mouth. Tr. 3-79 to 3-83. Furthermore, petitioner's counsel attempted to elicit testimony from Walls suggesting that petitioner's nephew, Charles Durham, was the murderer. Walls said that he had been friends with Charles Durham for 15 years, Tr. 3-74, and he admitted that Charles Durham had arranged for Walls to purchase a green station wagon — later identified as the getaway car — and to put the title in Walls' name, Tr. 3-74 to 3-75. Walls also admitted that Charles Durham drove the car more than petitioner did. Tr. 3-75 to 3-77.

In addition to the preceding lines of questioning, petitioner contends that he should also have been allowed to ask Walls whether state drug charges against Walls had been dismissed in exchange for Walls' testimony against petitioner. Petitioner asked Walls if he had been arrested

for possessing cocaine shortly before Clark's murder, and Walls admitted before the jury that he had been arrested on that charge. Tr. 3-83. But the government objected to further cross-examination concerning the state charges (the cocaine charge and a marijuana possession charge). Following a hearing without the jury present, the district court barred petitioner from questioning Walls about the state drug charges on the ground that there was no evidence that any arrangement had been made to dismiss Walls' drug charges in exchange for his testimony. Tr. 3-103, 3-105.

On the facts of this case, the district court's ruling did not violate petitioner's rights under the Confrontation Clause of the Sixth Amendment. Petitioner's counsel argued to the district court that although evidence regarding the drug charges against Walls would not otherwise be admissible, counsel should be permitted to introduce that evidence "if those particular charges were in fact dismissed or held in abeyance or if someone, some deal or promise was made by any law enforcement officials as a result of his giving testimony here today." Tr. 3-84. After arguing that the dispositive question was whether there was any "deal or promise" by the government, petitioner's counsel agreed to have that issue explored outside the jury's presence. Tr. 3-84.

At that hearing, the federal prosecutor denied that the state charges were dropped in exchange for Walls' testimony in this case, Tr. 3-85, and petitioner's counsel admitted that he had no evidence of any such agreement between the prosecutor and Walls, *ibid.* In addition, Walls repeatedly denied that he had made any "deal" with either state or federal law enforcement officers linking his testimony in this case with the disposition of the state charges against him. See Tr. 3-87, 3-88, 3-89, 3-90, 3-95, 3-97. Thus, the evidence elicited at the hearing conclusively

answered the only point raised by counsel for petitioner in arguing the admissibility of evidence regarding Walls' state drug prosecution.

Petitioner now argues, Pet. 8-9, that he should have been able to explore the circumstances surrounding Walls' state prosecution even in the absence of evidence that there was an agreement between Walls and the State regarding Walls' testimony in the federal case. The evidence should have been admitted, petitioner now argues, because even in the absence of a formal agreement, Walls might have believed that he would be treated favorably in his state case if he testified favorably for the prosecution in this case. Petitioner, however, failed to make that argument before the district court. His argument, instead, was that the fact that the state charges were ultimately dismissed constituted a "prima facie showing" that Walls received some benefit as a result of his cooperation with law enforcement officials in connection with this case. Tr. 3-104 to 3-105.

The district court properly rejected the argument on which petitioner's counsel relied. The evidence elicited at the hearing outside the presence of the jury failed to establish any link at all between the dismissal of the state charges and Walls' cooperation in this case. And because petitioner failed to argue before the district court the point he now presses — that the evidence regarding the state drug charges should have been admissible even if there was no "deal" between Walls and State —the district court cannot be faulted for having failed to admit the evidence on that theory.

Petitioner argues, Pet. 5-6, as he did before the district court, that Walls admitted that there was a linkage of sorts between the two cases when he stated that at some point during the pendency of the state charges, law enforcement officials told him "they were going to go down and get it

taken care of and keep it." Tr. 3-88. Further testimony on that point, however, made it clear that what Walls was referring to was not the disposition of the state charges — and certainly not the disposition of those charges contingent on his cooperation in this case — but the question of his obligation to appear in state court for a particular court date. As Walls explained, shortly after he began cooperating with law enforcement authorities in connection with this case, he received a threatening telephone call. Tr. 3-88. In response to that threat, federal agents arranged to move Walls out of the State for a period of time to protect him. When Walls asked whether his departure would relieve him of his obligation to meet a court date in the state case against him, he was told that the court date would be "taken care of" by having it rescheduled. Tr. 3-93, 3-99 to 3-100; see also Tr. 3-88, 3-92, 3-98. Under these circumstances, it was entirely reasonable for the district court to conclude that there was no evidence to support petitioner's theory that any "deal" was made between Walls and either the state or federal government, Tr. 3-103. It was therefore reasonable for the court to refuse to permit petitioner to elicit the details of the drug charges against Walls, a matter that would otherwise be inadmissible under the Rules of Evidence. See Fed. R. Evid. 608(b).

None of the cases on which petitioner relies is contrary to the decision in this case. This Court's decision in *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), is inapposite because in that case it was conceded that there was an agreement to dismiss charges against the witness in exchange for his cooperation with the government; the trial court had excluded the evidence of that agreement because the witness had testified, outside the presence of the jury, that the State's promise had not affected his testimony. Both the Delaware Supreme Court and this

Court held that the evidence should have been admitted. In so ruling, this Court emphasized that the agreement was conceded, and that the jury could well have concluded that it furnished the witness a motivation for favoring the prosecution in his testimony, even though he insisted that the agreement had no such effect. 475 U.S. at 679. This case is entirely different from *Van Arsdall*, since in this case there was no evidence of any such agreement.

The Fifth Circuit's decision in *Carrillo* v. *Perkins*, 723 F.2d 1165 (1984), is likewise unhelpful to petitioner. In that case, the State's chief witness was exposed to possible prosecution on state felony charges unrelated to the subject matter of his testimony, and the witness admitted that he "thought about his exposure to prosecution for this offense while testifying against [the defendant]." 723 F.2d at 1167. The court of appeals held that under those circumstances it was error for the trial court to bar the defendant from eliciting before the jury the evidence regarding the witness's exposure to other charges. In so holding, however, the court emphasized two features of the case that are not present here: first, the witness in *Carrillo* admitted that he "thought about his exposure to prosecution" while he was testifying for the State; and second, the same sovereign that had the potential charges against the witness was using the witness at trial. See 723 F.2d at 1169-1170. In fact, the Fifth Circuit in *Carrillo* distinguished several of its own prior decisions on the ground that the government witnesses in those cases were not subject to prosecution by the same sovereign that was prosecuting the defendants. The government witnesses in those cases, the *Carrillo* court pointed out, "were witnesses in federal cases who were shielded from cross-examination regarding prior arrests by a state and a foreign

country." 723 F.2d at 1170. Even in the Fifth Circuit, then, it would not have been error for the district court to exclude the evidence regarding Walls' state prosecution.[1]

Even if the district court's restriction on petitioner's cross-examination of Walls was error, the error was harmless. See *Delaware* v. *Van Arsdall*, 475 U.S. at 681-684 (holding that Confrontation Clause violations are subject to harmless error analysis). Because of the strength of the case against petitioner and the relatively minor role played by Walls in the case, the exclusion of the evidence regarding Walls' state prosecution could not have prejudiced petitioner.

Walls was not an important witness against petitioner. Eyewitnesses gave very damaging testimony about petitioner's activities before, during, and after the shooting, and two witnesses testified that petitioner admitted that he had killed Clark. Gov't C.A. Br. 1E-1G. In contrast to the devastating eyewitness and admission testimony against petitioner, Walls' testimony concerned collateral matters that were corroborated by other evidence. Thus, Walls testified that he had once overheard petitioner tell Charles Durham that "the mailman" owed him money, and he testified that petitioner had used the green station wagon on the day Clark was murdered.

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[1] In *United States* v. *Mayer*, 556 F.2d 245 (1977), and *United States* v. *Onori*, 535 F.2d 938 (1976), the Fifth Circuit stated that a witness may be impeached not only if a "deal" exists with respect to his testimony, but also if he believes that there is any such "deal." In this case, however, the evidence at the hearing outside the jury's presence was unequivocal on that point: there was nothing to suggest that Walls believed that he stood to benefit, with respect to his state prosecution, from any testimony he might give in the federal case. Moreover, as we have noted, petitioner's counsel did not argue this theory of admissibility to the district court, so it cannot now be offered as a basis for reversal.

Tr. 3-68 to 3-69. That testimony was corroborated by the testimony of Charles Durham, who said that petitioner told him that Clark owed him money and that petitioner had used the green car on the day of Clark's murder. Tr. 3-146, 3-151. Finally, despite the district court's ruling, petitioner elicited Walls' admission that charges were pending against him before the murder (and thus before he began cooperating with the government in connection with the murder investigation). Tr. 3-83. The jury therefore was aware of the state charges against Walls that petitioner claims gave Walls an incentive to testify falsely against him. Under these circumstances, the court of appeals was correct in concluding that the district court's ruling did not prejudice petitioner.

2. Petitioner contends that the district court erred in permitting the government to elicit hearsay evidence from a defense witness. Pet. 10-12. During the defense case, petitioner attempted to show that Clark was killed by someone other than petitioner. Defense witness George Walker, a post office employee, testified that on several occasions, including the day of the murder, an unidentified person approached him and asked Walker to have Clark contact him. On cross-examination, the government asked Walker the identity of the person who had approached him. Walker testified that he had been told that the person was either a landlord or a realtor. The district court overruled petitioner's hearsay objection to Walker's testimony on cross-examination.

The court of appeals held, Pet. App. A4, that by eliciting evidence that somebody was looking for Clark and thereby suggesting that someone other than petitioner had committed the murder, petitioner "opened the door" for the prosecutor to erase that false impression by eliciting evidence from that same witness that the person looking for Clark was only interested in a real estate transaction.

While the admission of the evidence of the unknown person's identity may well have served the interests of fairness by completing the very incomplete picture that petitioner's evidence presented, we concede that the evidence of the unknown person's identity was inadmissible as hearsay. Nonetheless, the admission of that evidence was harmless error. The case against petitioner was strong and consisted of both direct and circumstantial evidence. The defense that the "unknown person" may have committed the murder was based on nothing more substantial than the fact that someone other than petitioner was asking about Clark at about the time he was killed. The George Walker testimony thus provided only weak support for the "other killer" hypothesis. In any event, however, to the extent that the George Walker testimony had any force, it was not significantly undercut by the government's evidence that the unknown person was a landlord or a realtor. Anyone asking about Clark for the purpose of arranging to kill him presumably would not disclose his true purpose; since such a person might logically claim some innocent purpose such as a real estate transaction, the government's evidence on this point did not deprive petitioner of whatever benefit petitioner might have obtained from the George Walker testimony.

3. Petitioner maintains that the government failed properly to authenticate a threat letter and that a copy of the letter should not have been admitted into evidence in lieu of the missing original letter. Pet. 12-14. During the government's case, Odessa Clark, the victim's mother, testified that about one year before the shooting she received a letter from a man whom she could no longer identify. The letter, which was addressed to "K.C." from "Ricky," advised "K.C." to pay his debt of $1,500 because a "warrant is out for your head." After the shooting, Odessa Clark gave the letter to the police, who kept the original

and gave a xerox copy to the victim's sister. Before trial, the police lost the original. At trial, the district court admitted the copy into evidence over petitioner's objection.

a. Contrary to petitioner's contention, this issue does not really raise a question of authentication. The government represented the letter to be one Mrs. Clark received, sent to "K.C." from "Ricky." Mrs. Clark's testimony amply authenticated the letter by establishing that it was the letter she received. The question, instead, is one of conditional relevance. See Fed. R. Evid. 104(b). That is, the letter was relevant if, but only if, the finder of fact concluded that "K.C." was the victim, Kenneth Clark, and "Ricky" was petitioner, Ricky Durham. If the jury could find those conditions satisfied by a preponderance of the evidence, the letter was properly admitted. See *Huddleston* v. *United States*, 485 U.S. 681 (1988).

The evidence was clearly sufficient to support a jury finding on both issues. That a letter addressed to "K.C." and sent to the Clark home was intended for Kenneth Clark was certainly a reasonable inference, particularly in light of the evidence regarding Clark's involvement in the drug trade. The fact that Clark showed the letter to an associate of his is also strong evidence that the letter was sent to and intended for Clark. See Gov't C.A. Br. 1D. Similarly, there was sufficient evidence from which the jury could conclude that the threat letter was written by petitioner.[2] Clark had purchased cocaine from petitioner, and petitioner had been heard to say that Clark owed him money. Petitioner on one occasion instructed his nephew Charles Durham to get money from Clark. Petitioner later told Charles Durham that petitioner would have to "hurt" Clark if Clark did not pay his debt. The letter itself

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[2] Petitioner refused to give handwriting exemplars in spite of a court order to do so. Tr. 3-229.

referred to the debt and was signed "Ricky," which is petitioner's first name.

3. Petitioner also had no basis for objecting to the introduction of a copy of the threat letter rather than the original. Clark's mother and sister, each of whom had read the original letter, both testified that the copy accurately reflected the contents of the original letter, and there was no contrary evidence on that point. The district court therefore properly admitted the copy of the letter in lieu of the missing original. See Fed. R. Evid. 1003; *United States* v. *Chan An-Lo*, 851 F.2d 547, 557-558 (2d Cir.), cert. denied, 109 S. Ct. 493 (1988); *United States* v. *Leight*, 818 F.2d 1297, 1305 (7th Cir.), cert. denied, 108 S. Ct. 356 (1987).

4. Petitioner claims that the district court should have granted his motion for a mistrial, because the prosecutor in his opening statement referred to evidence that the district court subsequently ruled inadmissible. Pet. 14-16. In his opening statement, the prosecutor stated that the evidence would show that Clark called petitioner after receiving the threatening letter. In that telephone call, Clark allegedly told petitioner that he would pay petitioner his money, but that petitioner should stay away from Clark's mother. During the government's case-in-chief, a government witness testified that Clark "went to call 'Ricky' " after receiving the threatening letter. The district court upheld petitioner's objection that the witness's identification of "Ricky" was inadmissible and struck that portion of his testimony. Gov't C.A. Br. 17-19. Petitioner then renewed his motion for a mistrial based on the prosecutor's reference to that evidence in his opening statement. The district court denied the motion, but it instructed the jury that the opening statements were not evidence.

A prosecutor's reference to evidence that is later found inadmissible does not warrant a mistrial if the evidence is not central to the case and the trial court issues a curative instruction. In *Frazier* v. *Cupp*, 394 U.S. 731 (1969), the Court held that a prosecutor's recital in his opening statement of evidence that the trial court subsequently ruled inadmissible was not grounds for a mistrial. The Court reasoned that the prosecutor merely summarized objectively the evidence that he reasonably expected to produce and did not emphasize that the evidence later held inadmissible was crucial to the prosecution's case. Furthermore, the trial court had instructed the jury that the arguments of counsel in their opening statements are not evidence. 394 U.S. at 733-737. The courts of appeals likewise consider the likely impact of the prosecutor's remarks and the trial court's curative actions in determining whether a mistrial is warranted in such circumstances. See *United States* v. *Brockington*, 849 F.2d 872, 875 (4th Cir. 1988); *United States* v. *Tolman*, 826 F.2d 971, 973-974 (10th Cir. 1987).

In this case, the district court correctly denied petitioner's renewed motion for a mistrial. In his opening statement, the prosecutor merely told the jury what he reasonably expected the evidence to show, and he did not highlight the identification evidence that the district court subsequently ruled inadmissible. Moreover, the court gave a cautionary instruction to the jury, advising it that the prosecutor's comment did not constitute evidence. Under these circumstances, it is extremely unlikely that the prosecutor's comments in his opening statement prejudiced petitioner. Indeed, to the extent that any of the jurors even recalled the opening statements by the time they retired for deliberations, the government's failure to offer evidence with respect to a point made in its

opening statement probably worked to the disadvantage of the government, not the defense.

5. Finally, petitioner contends that the district court erred in permitting the government to impeach a defense witness with her prior inconsistent statement and in failing to instruct the jury to consider that statement for impeachment purposes only. Pet. 17-18. During the defense case, petitioner sought to explain that he fled from St. Louis after the shooting because law enforcement agents threatened to kill him. Norma Ross, a defense witness, testified on direct examination that law enforcement agents had told her that they would kill petitioner and that she had advised petitioner of those threats. On cross-examination, Ross denied having told Postal Inspector Post that she feared that petitioner would kill both her daughter and petitioner's nephew, and that she had discussed the idea of placing her daughter in protective custody. In rebuttal, Inspector Post testified that Ross had told him that petitioner was dangerous. The district court admitted Post's testimony for impeachment purposes only, but it did not give a limiting instruction to that effect to the jury. Petitioner neither requested a limiting instruction nor objected to the court's failure to give one. Gov't C.A. Br. 19-23.

The prosecutor properly cross-examined Ross and offered rebuttal evidence concerning the pretrial statement in which Ross expressed her fear of petitioner, because that evidence showed a clear motive for Ross to testify favorably to the defense. See, *e.g.*, *United States* v. *Stockton*, 788 F.2d 210, 219-220 (4th Cir.), cert. denied, 479 U.S. 840 (1986); *United States* v. *Cerone*, 452 F.2d 274, 288 (7th Cir. 1971), cert. denied, 405 U.S. 964 (1972); *United States* v. *Briggs*, 457 F.2d 908, 910-911 (2d Cir.), cert. denied, 409 U.S. 986 (1972). While petitioner would have been entitled to a limiting instruction on request, the dis-

trict court was not required to instruct the jury, sua sponte, to consider Ross's prior inconsistent statement solely for impeachment. Rule 105, Fed. R. Evid., requires a trial court to give a limiting instruction in appropriate circumstances upon request by a party. Because petitioner did not request a limiting instruction, the district court had no duty to give one. See *United States* v. *Spetz*, 721 F.2d 1457, 1476-1477 (9th Cir. 1983); *United States* v. *Russell*, 712 F.2d 1256, 1258-1259 (8th Cir. 1983). See also *Greer* v. *Miller*, 483 U.S. 756, 766 n.8 (1987) (counsel bears primary responsibility for ensuring that jury is given proper limiting instruction). Petitioner argues, Pet. 18, that the court's failure to give a limiting instruction constituted "plain error" that led to a miscarriage of justice. That assertion, however, is unconvincing in light of the minor role played by the witness Ross and the compelling evidence of petitioner's guilt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1989

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